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No. 80-1582

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

v.

JEFFREY R. MACDONALD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. Respondent contends (Br. 20-23) that the Speedy Trial Clause applies to a period when all charges against a person have been dismissed. He relies primarily on *Klopfer* v. *North Carolina*, 386 U.S. 213 (1967), for the proposition that the interests protected by the Speedy Trial Clause are implicated during such a period, but *Klopfer* is completely inapposite because it concerns a period when the defendant was subject to an unliquidated criminal charge.[1] As explained in our opening brief (Br. 21-

[1] Unlike the state prosecutor in *Klopfer*, the military authorities who had "arrested" respondent had no power at all to bring him to trial, speedily or otherwise, once he had been discharged from military service. *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11 (1955).

22), the dismissal of the charges against respondent dispelled the unfavorable consequences that triggered his right to a speedy resolution of those charges. Respondent points to nothing in the record that indicates that his situation after the dismissal was significantly different from that of any person who is known to be under investigation for a crime; like such a suspect, respondent was not being "held to answer" a criminal charge and had no right to a speedy trial. See *United States* v. *Marion*, 404 U.S. 307, 321 (1971).[2]

As explained in our opening brief (Br. 28-30), the rule advanced by respondent would have an adverse impact on the administration of justice. It is no answer to assert, as respondent does (Br. 23-24), that the court of appeals would not have dismissed the indictment had it been returned within the period that the court deemed necessary for a full investigation. A prosecutor cannot depend on the fact that a court will agree with him on the proper time within which to seek an indictment, and his decisions in this regard will necessarily be affected, in ways that do not further the interests of justice or of defendants, by the threat of the severe sanction of dismissal of the indictment if he does not act with sufficient expedition. See *United States* v. *Lovasco*, 431 U.S. 783, 793 (1977). The interests of justice are not served by placing these constraints on the prosecutor when no Sixth Amendment right of the defendant is implicated because he is not subject to any pending charges. Rather, the Speedy Trial Clause simply does not ap-

[2] Respondent's brief wholly ignores the "held to answer" portion of *Marion*'s description of the circumstances in which the Sixth Amendment speedy trial right attaches.

ply to a period when there is no charge on which the defendant can speedily be tried.[a]

2. Respondent urges (Br. 16, 25-29) that a post-dismissal period when no charges are pending against a defendant must be counted for speedy trial purposes in order to prevent the prosecution from circumventing the speedy trial right by successively dismissing and reinstating an indictment. As stated in our opening brief (Br. 31-32), there is no danger of such circumvention because the entire period during

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[a] The decisions of the courts of appeals on this point are discussed in our opening brief (Br. 25-28). Those additional cases cited by respondent that involve successive charges (Br. 26), in all of which the speedy trial claim was rejected, are inapposite—either because there was no intervening period during which no charges were pending against the accused (*United States* v. *Huffman*, 595 F.2d 551, 556 (10th Cir. 1979)), or because that period was such a small portion of the total delay that it was unnecessary to determine whether it counted in the speedy trial calculation (*Jones* v. *Morris*, 590 F.2d 684 (7th Cir.), cert. denied, 440 U.S. 965 (1979); *United States* v. *Merrick*, 464 F.2d 1087 (10th Cir.), cert. denied, 409 U.S. 1023 (1972)). We also note that respondent (Br. 27) mischaracterizes as the holding of the Missouri Court of Appeals that court's summary of the holding of the court of appeals in the instant case and its quotation from another case. *State* v. *Black*, 587 S.W. 2d 865, 874 (Mo. Ct. App. 1979). In fact, the Missouri court emphatically rejected that view, stating that when the charges against a person have been dismissed, "he is under no restraint or public accusation and, thus, cannot be said to suffer from the potential prejudice or harm the right to a speedy trial protects against." *Id.* at 874 n.8. Accordingly, the court stated, constitutional protection extends to such a period "if, but only if, the cause for the delay during this period was unjustified, such as a deliberate attempt by the state to delay the trial in order to hamper the defense." *Ibid.*

which charges are pending against an accused will be counted in the speedy trial analysis. Moreover, any such intentional government action, if done to secure a tactical advantage, implicates the protections of the Fifth Amendment. In any event, respondent's contention is particularly inapposite in this case. There is no suggestion here that the post-dismissal delay was deliberate (see page 5, *infra*). The prosecutor that respondent claims has denied him a right to a speedy trial, the Justice Department, did not control the antecedent military proceedings that respondent contends irrevocably triggered his speedy trial rights. And respondent himself vigorously sought the termination of those military proceedings by dismissal of the military charges after the Article 32 hearing. Thus, this case could not be further from the specter raised by respondent of a prosecutor frustrating a defendant's desire for a speedy trial by dismissing and reinstating charges at whim.

3. Respondent argues (Br. 30-38) as an alternative ground for affirmance that, even if the Speedy Trial Clause does not apply to the period of delay between dismissal of the military charges and the return of the indictment, the delay violated his due process rights under the Fifth Amendment. As noted in our petition (Pet. 19), a lengthy delay prior to accusation may violate the Fifth Amendment, but only if it both causes actual prejudice to the defense and is the product of fundamentally unfair government conduct—for example, if the delay is an intentional device to obtain a tactical advantage over the accused. See *United States* v. *Lovasco*, *supra*, 431 U.S. at 788-796 & n.17. Respondent's claim meets neither of these requirements.

Respondent has already conceded during the earlier litigation of this case in this Court that he "does not claim that the delay in his case was the result of a deliberate attempt by the government to hamper his defense" (75-1892 Br. 44).[4] Nor does respondent suggest here that the investigative delay deviated from "elementary standards of 'fair play and decency'" (*United States* v. *Lovasco*, *supra*, 431 U.S. at 795). Rather, he simply asserts that the delay was "unreasonable" (Br. 31), apparently relying on statements made by courts below. These courts, however, attributed the portion of the delay deemed unreasonable to either "negligence" (531 F.2d at 207), "bureaucratic indifference" (Pet. App. 7a), or a "lackadaisical attitude" (*id.* at 16a)[5]—all factors that are plainly insufficient to warrant dismissal of an indictment on due process grounds. Accordingly, respondent's due process claim is without foundation.

4. a. Nor is there any basis for concluding that respondent suffered any actual prejudice as a result of the delay—an element that is indispensable to the due process claim and highly material to the speedy trial claim. On the issue of actual prejudice, respondent primarily relies (Br. 33-38) on a contention raised for the first time in his post-trial appeal—the speculative assertion that the delay was the probable cause of Helena Stoeckley's testimony at trial that she could not recall her whereabouts during the time the murders were committed. As explained in our opening brief (Br. 40-42), this assertion is with-

[4] The court of appeals in *MacDonald I* specifically found that the delay was not a deliberate effort to hamper the defense (531 F.2d 196, 205-206 (1976)).

[5] We, of course, do not concede that even these descriptions are appropriate.

out foundation. Not only does it defy common sense to believe that Stoeckley forgot about her alleged participation in the murders with the passage of time, but, as the dissenters on rehearing found (Pet. App. 46a), the record clearly establishes that Stoeckley's memory gap as to this period existed from the outset. Stoeckley herself explained at trial (J.A. 52-54) that her inability to recall her whereabouts during the early morning of February 17 was caused by her consumption of large quantities of drugs, an explanation that is fully consistent with numerous statements that she made shortly after the murders and in other conversations with acquaintances and investigators (see J.A. 11-15, 22, 24-25, 138-139, 149, 152-153).[6]

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[6] Respondent does concede that it is possible that Stoeckley would have given the same testimony had the trial been held without delay, but he asserts that he cannot be forced to assume the burden of establishing that the trial would have been different if it had been held earlier (Br. 38). But that is precisely the burden that the "actual prejudice" requirement places on a defendant; in order to establish a due process violation based on unfair pre-accusation delay, the defendant bears the burden of "demonstrat[ing] that the delay before indictment actually prejudiced his ability to defend himself at trial." *United States* v. *Elsbery*, 602 F.2d 1054, 1059 (2d Cir. 1977), cert. denied, 444 U.S. 994 (1979). See also *United States* v. *Lovasco*, *supra*, 431 U.S. at 789-790. Plainly, neither this standard, nor even the slightly more relaxed standard applicable to Sixth Amendment claims, is satisfied by respondent's speculation that, if the trial had been conducted earlier, it is possible that Stoeckley's recollection of her activities on the night of the murders would have been more complete. Indeed, even the court of appeals' findings do not assist respondent's Fifth Amendment claim because the court below found only a "substantial possibility of prejudice," which it deemed sufficient to establish a Sixth Amendment violation

Moreover, the record does not support respondent's fundamental premise that Stoeckley "admitted to presence at the scene of the crime" (Br. 7 n.6; see also Br. 17-18, 34-38). The isolated statements of Stoeckley that respondent has characterized as inculpatory state only that she *could* have been present at the murders; they are in the nature of hallucinations or acquiescence in suggestions of other persons, not specific recollections of her presence at the scene of the crime.[7] And, as pointed out in our opening brief (Br. 40-41 & n.34), these statements were accompanied by other statements disclaiming any involvement in the murders or recollection of her whereabouts during that night (J.A. 14-15, 22, 124, 130, 133, 138-141, 152-153).[8]

(Pet. App. 11a, 14a). The court of appeals implicitly conceded that there was no "actual prejudice" here (*id.* at 11a, 16a).

[7] For example, although respondent states (Br. 35) that Stoeckley told a neighbor, William Posey, that she held a light during the murders, Posey's contemporaneous testimony clearly states that he suggested to Stoeckley that she could have been present at the murders holding the light and that, in response, "she kinda * * * just nodded her head and let it go at that" (J.A. 21-22). Also, Stoeckley's 1979 statement to respondent's counsel that she "remember[ed] standing at the couch [in respondent's home] holding a candle * * *" (see Br. 37) clearly describes a hallucination because the full quote concludes: "[the candle] wasn't dripping wax. It was dripping blood" (Tr. 5937).

[8] Respondent also adopts the court of appeals' assertion (Pet. App. 10a) that he was prejudiced because the delay disabled him from effectively probing the recollection of the prosecution's witnesses (Br. 32-33). As we have previously explained (Gov't Br. 39-40), this contention is insubstantial here because the scientific evidence that formed the basis of the government's case was primarily the product of reports

b. Respondent also alleges two areas of prejudice that were not relied upon by the court of appeals. First, he quotes (Br. 32 n.31) from a 1977 statement made by Dr. John I. Thornton, a forensic scientist, that the delay "imposes severe constraints on the selection and execution of tests that may be applied to various aspects of the physical evidence in this case * * *." Respondent apparently is renewing a contention made when this case was last in this Court (see 75-1892 Resp. Br. 56, App. B6), namely, that the delay prevented the defense from performing certain blood tests and a wax drippings analysis. This contention was rebutted at length then (75-1892

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made contemporaneously with the analysis of the physical evidence. Such evidence does not diminish with the passage of time, nor does the ability of the defense to cross-examine government expert witnesses concerning their techniques and to present its own testimony challenging their conclusions. The example used by the court of appeals (Pet. App. 16a-17a n.7) illustrates this point. A government technician testified, based on her contemporaneous notes, that she had determined in 1974, by inserting probes through icepick holes in respondent's pajama top and comparing the pattern to the pattern of Colette MacDonald's stab wounds, that the garment was covering Colette's body when the holes were made (Tr.4430-4439, 4457-4474). This crucial evidence of respondent's guilt totally contradicted respondent's story that the holes resulted from his use of the garment to fend off an ice-pick-wielding attacker and that he had placed it on his wife's body after the attack. The defense, however, never challenged the technician's recollection of the manner in which she conducted the experiment. Instead, it challenged her general methodology and alleged inconsistencies between her methodology and the general appearance of the pajama top holes as observed by another government technician in 1971 (Tr. 4475-4539, 5312-5318). In addition, a defense expert contested the conclusion that the holes were made while the garment was stationary (Tr. 5150-5154, 5158-5171). Thus, the time that passed between the crime and the trial had no bearing on the defense's effort to refute this evidence.

Gov't Reply Br. 5-8), and respondent has not addressed any of the points made in the government's response. Accordingly, we will only briefly recapitulate here why this contention is insubstantial.

Dr. Thornton's main point was that at the time of respondent's indictment it would no longer have been possible to analyze bloodstains found at the crime scene for their "serum types and isoenzyme types." The blood factors with which serum protein and isoenzyme analysis are concerned, however, do not persist for more than a few weeks after the formation of the blood stains, and the techniques for performing such tests were not widely disseminated in the United States until 1972, two years after the killings. Thus, the inability to perform an isoenzyme analysis can in no way be ascribed to the delay complained of here between the submission of the final CID report to the Department of Justice in 1972 and the return of the indictment in January 1975. Moreover, an isoenzyme analysis would have been of little relevance here. The test permits discrimination between two persons having the same blood group under the accepted A-B-O genetic marker system. Here, however, respondent and the three victims each had a different A-B-O blood group (see Gov't Br. 3). Thus, there was no need to conduct a test that would permit greater discrimination within a single blood group in order to determine the identity of the probable source of each bloodstain.[9]

[9] The Thornton affidavit acknowledged that the ability to perform A-B-O bloodtyping of bloodstains does not normally dissipate over time (75-1892 Resp. Br. App. B6). Moreover, in a second affidavit Dr. Thornton drew back from his original broad assertion, stating that "some of the evidence may not be susceptible to accurate scientific analysis due to passage of time; however, there is no way of knowing for certain if

With respect to testing the wax drippings, the government's own tests showed that some of the wax drippings found in the MacDonald apartment did not come from any identifiable source of wax in the apartment, and this fact was revealed at trial (Tr. 3838-3845). This result is consistent with respondent's story that his home was invaded by intruders carrying a candle. Respondent has never suggested what he could have hoped to establish with further testing of wax samples and thus how he conceivably was prejudiced by his inability to perform further tests on the wax.

c. In direct contrast to the court of appeals' suggestion (Pet. App. 10a; see note 8, *supra*) that respondent was prejudiced by the possibility that the prosecution filled "lacunae of recollection" to assure the consistency of its witnesses' testimony, respondent contends (Br. 33 n.32) that he was prejudiced because the trial testimony of two prosecution witnesses differed from earlier statements they had made. This contention is completely without merit.[10]

Of course, as we pointed out in our earlier reply brief in this case (75-1892 Reply Br. 4), the constitutional protection against undue prejudice to the defendant caused by delay does not guard against a strengthening of the government's affirmative case; it is the loss of evidence favorable to the defense that

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the evidence can be properly and fully evaluated until after a complete physical study of this evidence is undertaken" (C.A. App. 1637). At trial, Dr. Thornton presented expert testimony contrary to the testimony of many of the government's expert witnesses, but he did not suggest that the delay prevented the selection and execution of the necessary tests (Tr. 5128-5218).

[10] The court of appeals noted this contention but declined to address it (Pet. App. 10a n.3).

can give rise to "prejudice" in this context. Nor did the delay here in any way restrict the ability of the defense to cross-examine prosecution witnesses. When Pamela Kalin Cochran testified at trial to the presence of an icepick in respondent's home (Tr. 3559-3560), she was cross-examined at length with respect to her 1970 statement to an investigator that she did not recall seeing the icepick there, and she explained why she had subsequently been able to recall the presence of the icepick (Tr. 3567-3572). Similarly, Dr. Severt Jacobson fully explained on cross-examination the apparent discrepancy between his 1970 testimony that in his opinion a physician could not accurately assess the medical consequences of a self-inflicted pneumothorax wound (VII Art. 32 Tr. 603; see Tr. 2862-2863)[11] and his testimony at trial that "[s]tatistically he could guess [the medical consequences]" (Tr. 2863). Dr. Jacobson explained that, in light of his further training in surgery (see Tr. 2847-2849), his opinion had "changed a little bit" (Tr. 2869) because he had realized that a careful surgeon could control the depth to which he would insert a knife into himself (Tr. 2877-2878).

5. Respondent contends (Br. 38-43) that the trial court erred in excluding certain hearsay testimony. As we pointed out in our reply memorandum at the petition stage (Reply Mem. 5), this issue is not before the Court; it was not considered by the court of appeals and cannot be raised as an alternative ground for affirmance because, even if respondent's contention were correct, the remedy would not be dis-

[11] Dr. Jacobson did not testify, as respondent asserts (Br. 33 n.32), that "he did not believe that the stab wound in [respondent's] lung was self-inflicted."

missal of the indictment. We note only that the trial court's decision was fully in accord with the language of Fed. R. Evid. 804(b)(3), and the record does not support respondent's assertion (Br. 41) that "there is a remarkable degree of corroboration" for the hearsay statements. See Pet. App. 56a-63a.

CONCLUSION

For the foregoing reasons and those stated in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

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